Supreme Court of the United States

OCTOBER TERM, 1952

No. 344

JAMES MARR, d.b.a. MARR DUPLICATOR COMPANY,
Petitioner,

v.

A. B. DICK COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion (which was also the findings of fact and conclusions of law) of the District Court (M. App. p. 231-272) is reported at 95 F. Supp. 83. The opinion of the Court of Appeals for the Second Circuit (D. App. 1130-1138) is reported at 197 F. (2d) 498.[1]

[1] The printed record below was incorporated in two appendices. The appendix to the brief of petitioner Marr will be referred to as "M. App."; that of respondent Dick as "D. App.". The proceedings in the court below have been paged consecutively with the appendix of respondent (D. App.).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 26, 1952 (D. App. 1138). A petition for rehearing filed on June 23, 1952, was denied on July 22, 1952 (D. App. 1169). The jurisdiction of this Court is sought to be invoked under U.S.C., Title 28, Section 1254 (1).

QUESTIONS PRESENTED

Petitioner's statement of the questions presented warrants a restatement. The questions actually presented are as follows:

1. Whether the court below erred in holding that petitioner could not qualify as a party aggrieved and in dismissing the appeal as moot.

2. Whether the court below erred in concluding that no further investigation of the alleged fraud was warranted.

STATEMENT

Whether or not the petition and supporting brief in this case can be considered as in compliance with Rule 38(2), they patently demand a summary statement of the case for the convenience of the Court.

This case began over twenty years ago as one of several proceedings by respondent A. B. Dick Company (Dick) to enjoin infringement of its patent on a so-called "dry" mimeograph stencil (No. 1,526,982, commonly known as the "Hill" patent). Suit was filed on August 7, 1929 (M. App. 18-24), and on June 2, 1932, a judgment finding the Hill patent valid and infringed by petitioner Marr's stencil was entered, and an accounting was ordered (M. App. 2). The accounting was not completed and the master's report approved

until October 2, 1943 (*ibid*), over a year after the patent itself had expired (M. App. 231). An appeal was taken to the Court of Appeals for the Second Circuit, where the judgment was affirmed on June 26, 1946 (155 F. (2d) 923). Petitioner thereupon petitioned for a writ of certiorari (No. 504, October Term 1946).

On July 22, 1946, while the petition for certiorari was pending in this Court, an indictment under the Sherman Act was returned in the district court in Cleveland, Ohio, against five companies and six individuals, including A. B. Dick Company. A civil complaint against these defendants was filed the same day. In October 1946, the Solicitor General, as *amicus curiae*, filed a Memorandum in No. 504—the case then pending in this Court—quoting one of the allegations in the Cleveland indictment and complaint—that Dick had suppressed evidence of prior art in the litigation on the Hill patent—and suggesting that the Court "may wish to have an inquiry made to determine the truth of the facts alleged in the Government's antitrust proceedings". The Memorandum also stated that the United States would "offer its services as *amicus curiae* in the framing and trial of the issue" (M. App. 224, 227).

As a result of that suggestion, and without briefs or argument by the parties (the petition for certiorari having raised no such question), the Court vacated the 1946 judgment of the court below and remanded the case to that court for consideration of the question raised by the Solicitor General: "Whether respondent's prosecution of the instant case may not constitute a fraud upon the courts" (329 U.S. 680). Upon receipt of that mandate, the court below in turn vacated its prior decision and judgment and remanded the case to the District Court for consideration of the question (M. App. 10, 12).

In November 1948 issues were framed through the filing by the United States (which had been authorized to participate as *amicus curiae,* M. App. 5) of a document entitled "Notice of Issue and Facts Bearing Thereon to be Presented by United States, Amicus Curiae" (M. App. 98-153). The following month Marr filed a "Petition" praying that the court find that there had been a fraud upon the courts, that the decree and judgment be set aside, and for damages (M. App. 192-227). Answers to each were filed by Dick (M. App. 154-178, 179-191) as well as to a "Notice of Supplemental Issue and Facts Bearing Thereon" (D. App. 1122-1129), which had been filed by the United States shortly before the hearing. Further supplemental issues were brought forward during the hearing itself, and evidence relating to them was received and considered (See M. App. 234).

The trial, before Judge Harold R. Medina, was conducted at all times as an adversary proceeding, with counsel for both Dick and Marr, as well as counsel for *amicus curiae*, always present (see M. App. 228-229, 233). Cf. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580. The District Court recognized "the obvious importance of ferreting out any actual or attempted corruption of the judicial process" (M. App. 234), and not only gave the broadest possible construction to the question formulated by this Court, but as the opinion states (*ibid*), "every effort has been made effectively and thoroughly to explore and investigate the entire matter from beginning to end". The trial lasted over two months, with testimony from seven witnesses, some 240 exhibits and almost 4000 pages of transcript.

On December 8, 1950, the District Court filed an exhaustive opinion, and on January 3, 1951, entered two orders: (1) that the question submitted to the court be

answered in the negative—*i.e.*, that there had been no fraud upon the courts (M. App. 273-274) and (2) on motion of Dick, that the action—*i.e.*, the action for infringement begun in 1929—be dismissed with prejudice (M. App. 275).

(1) The basis for the first order is fully set forth in the opinion of the District Court (M. App. 231-272), to which this Court is respectfully referred. As that opinion indicates, the charges of fraud were explored thoroughly, painstakingly and at great length by the District Court, aided by all of the resources of the Department of Justice. Each of the numerous prior occasions where the same charges had been asserted and rejected was investigated in detail. Although all of the persons who figured prominently in the charges are long since deceased, those who had any connection with the challenged transaction and who survived the lapse of nearly a quarter century were called and testified at length. Contemporaneous documentary material was thoroughly sifted and examined, and much of it introduced into evidence. As the opinion itself states (M. App. 234):

> "While the trial has consumed over two months of the time of the court and the transcript and the exhibits make a record of formidable proportions, it seemed better to have it so and thus make every effort to dispose of the entire matter once and for all time, particularly as these charges in one form or another have been asserted and reasserted in the pleadings interposed in a number of actions pending in various courts over the past twenty-odd years, as will more fully appear later on in this opinion. Suffice it to say that every effort has been made effectively and thoroughly to explore and

investigate the entire matter from beginning to end."

At the conclusion of the hearing, the District Court prepared and filed what the court below described (D. App. 1133) as "a thorough and exhaustive opinion analyzing each separate charge of fraud which had been leveled against the Dick Company, making evidentiary and ultimate findings of fact thereon." Petitioner's brief makes almost no reference to these findings except to say (p. 76) that they "are incomplete, and in some instances erroneous". Apart from the many plain misstatements of fact in petitioner's brief, it wholly fails to indicate that the allegations it makes were directly controverted, elaborately tried out, and resolved against petitioner. The District Court's conclusion was (M. App. 266) "I find no fraud of any kind." Indeed, the brief is far closer to a summary of the charges made at the outset of the proceedings than to a summary of the facts which developed at the trial.

(2) The reason for the second order requires a further reference to the Cleveland antitrust proceedings instituted by the Government in 1946. As stated above (p. 3), both criminal and civil antitrust actions were filed. Pleas of *nolo contendere* were filed in the criminal proceeding, and a decree (Exh. 21) was entered by consent in the civil proceeding on March 25, 1948. Paragraph III, Sec. 11 of the decree required Dick, *inter alia*, to cease and desist from "maintaining" any litigation which sought to enforce the Hill patent. Pursuant to that requirement of the decree, Dick forthwith moved to dismiss this action (see D. App. 970, 981). The District Judge deferred the

ruling on the motion until there had been a hearing on the charges of fraud upon the court. At the conclusion of the trial on those charges, the order of dismissal was signed.

The appeal by Marr from both orders was dismissed by the court below (John J. Parker, Peter Woodbury, and Robert Russell, JJ., each sitting by special designation). The United States, which had presented the case in the District Court, decided not to participate in the appeal either by brief or argument. The court stated that dismissal of the plaintiff's case, with prejudice, gave Marr the basic relief for which he asked in his answer—final determination of the controversy in his favor as well as freedom from the possibility of further suit. The court further concluded that it is primarily the function of the law officers of the United States to protect the public interest in uncovering and punishing frauds upon the courts and that since Marr had obtained all the relief to which he was entitled, his role as protector of the public interest in cases such as this did not prevent the case from becoming moot. Nor was Marr entitled to appeal from a denial of special costs, including an attorney's fee, since he had never asked for these prior to argument in the court below. Finally, the court found that Marr's counterclaim, a general claim of damages which had been "allowed to lie completely fallow for twenty-three years" (D. App. 1136) was not enough to keep the litigation alive.

The court below also recognized, however, that even though the action was moot, that fact did not fully dispose of the fraud issue, since the court had the power and even the duty to initiate appropriate proceedings "to ferret out and punish fraudulent conduct of the kind under consideration" (D. App. 1137). The court

concluded, however, that this was not a case for the exercise of that power, since not only had the same fraud issue been litigated in several other Hill patent suits, and not only had the passage of time left only two survivors of those charged with wrong-doing, but also the charges had been found wholly without merit after a thorough exploration by the District Court.

Judgment of dismissal, at the cost of appellant, was entered on May 26, 1952 (D. App. 1138). A petition for rehearing (D. App. 1139-1168) was filed on June 23, 1952, and denied on July 22, 1952 (D. App. 1169).

REASONS FOR DENYING THE WRIT

I

There Is No Important Question Involved in the Dismissal of Petitioner's Appeal by the Court Below.

Petitioner devotes a substantial portion of his petition and brief to the contention that the court below erred in holding that the dismissal of the case by the District Court (see Statement, pp. 7-8, *supra*) required a dismissal of the petitioner's appeal. Not only is the decision below correct, but it presents no question worthy of review by this Court.

Although petitioner purports to challenge the action of the District Court in granting the motion to dismiss as well as that of the court below in giving effect to it, he cannot and does not really object to being freed from the judgment which had been obtained against him and from any future liability for his patent in-

fringement.[2] Indeed, even his objections to the action of the court below are far from clear. He is the prevailing party in a patent case. While the case was pending, the allegations of an antitrust action made it appropriate to inquire whether the judgment which Dick, the plaintiff in the action, had secured might not have been obtained by fraud. The inquiry, however, was made in the patent case, not in an independent action, and did not change the nature of the action from its original characteristic as a patent suit. When, due to the decree in the antitrust case, Dick was required to dismiss the suit, petitioner became the prevailing party. Had there been a finding of fraud, a similar result would have followed—the suit would have been dismissed because of Dick's unclean hands. Cf. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240. There might also, of course, have been other proceedings, but they would have been independent of the patent case, to punish any guilty parties by way of disbarment or contempt. Cf. *Kingsland* v. *Dorsey*, 338 U. S. 318.

The arguments by which petitioner seeks to deny that mootness is the necessary result of such a situa-

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[2] At no time during the period of over two years that the motion to dismiss the action was pending in the District Court (see Statement, *supra*, pp. 6-8) did petitioner or the United States, *amicus curiae*, make any objection to its being granted in the event no fraud was found; indeed, when it was renewed at the close of the last hearing in the District Court, counsel for petitioner made no response whatever (see D. App. 970, 981). Plainly he has not complied with Rule 46 of the Rules of Civil Procedure. The statements in the petition (*e.g.*, p. 24) that the motion was granted over the objections of the *amicus curiae* and petitioner are simply not true. Petitioner did appeal from the granting of the order, but his brief on appeal had no mention whatever of a basis or reason for his appeal.

tion are truly afterthoughts. Petitioner below urged only that the District judge was sitting as a Special Master for the Court of Appeals, which therefore, could and should review his decision (Reply Brief, pp. 28-30). That contention was so effectively demolished at the argument below that it no longer appears. Now, instead, petitioner urges that even as the prevailing party below he should be permitted to maintain an appeal because otherwise there will be no one to protect the public interest (see Petition, p. 24). Not only is there no authority for such a position, but there is no sound basis in reason for it. The public interest was very much in the minds of the court below, and as they indicated, means were readily at hand to protect it if need be (see Point II, *infra*). Nor is there any more merit in petitioner's reliance upon an ancient counterclaim; which, as the court below said, has been allowed to lie "completely fallow" for almost 20 years (D. App. 1136).

2. Moreover, this procedural question is plainly not one of general interest or importance. The combination of procedural circumstances here presented is not likely to recur, if for no other reason than that it has never, so far as we know, been presented before in any reported case. The decision below is correct, and the dismissal of the appeal simply presents no question worthy of review by this Court.

II

The Decision of the Court Below That No Further Investigation Is Warranted Presents No Question Worthy of Review Here.

Petitioner devotes much time and many pages to the contention that the courts below failed to do their full

duty to protect the integrity of the judicial process. Actually, it is abundantly clear from both of the opinions below that both courts were keenly aware of a weighty responsibility in that respect, and fully discharged it. The court below, after noting that the dismissal of petitioner's appeal did not end its responsibility, since it had the power to initiate a proceeding to investigate and punish fraud on the courts, concluded (D. App. 1137) that "this is not a case calling for its exercise". The court continued (ibid):

> "The charges of fraud examined into below were made by the defendants in several other suits brought by the present plaintiff in this and other circuits for alleged infringement of the Hill patent, but never in any case were the charges substantiated, and furthermore the court below, after no doubt the most thorough, complete and exhaustive exploration yet made of the charges, found them wholly without merit and fully exonerated all of the persons accused. Moreover all but two of the persons charged with wrongdoing are now dead, and the two still living, although actors in, were not the instigators of, the course of conduct said to constitute a fraud upon the courts, and both of these survivors after a thorough examination and analysis of the roles they played were given clean bills of moral health by the court below. Under these circumstances we see no occasion for another investigation of the defendant's charges of fraud."

Petitioner ignores this; indeed, he appears to go so far as to request that this Court review *de novo* the record made in the District Court. Such, at least, appears to be the burden of the section of his petition

stating the "Reasons for Granting the Writ" (pp. 22-24. In his brief, moreover, he challenges every detail of what the court below referred to (D. App. 1133) as "a thorough and exhaustive opinion." Petitioner does not challenge particular findings; rather he ignores the fact that findings were made. He challenges the testimony of witnesses, particularly on issues of motive and intent, with no regard for the obvious fact that the credibility of witnesses on such matters depends peculiarly upon the evaluation of the witnesses by the trial judge who hears them and can observe their demeanor on the stand—a commonsense principle which is embodied in Rule 52 of the Federal Rules of Civil Procedure.[3] See also *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341. Moreover, he challenges the findings and testimony with an abundant disregard even of the evidence itself. Were we to follow in petitioner's footsteps and seek to correct even major misstatements and distortions, we would extend this brief to inordinate lengths.

Finally, petitioner ignores the fact that these same issues have been litigated and relitigated for many years. The same essential charges, in fact, are set out in considerable detail in petitioner's answer *in 1939*, and they were also made, and litigated in *Arlac Dry*

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[3] Petitioner attempts to avoid this obvious conclusion by asserting (Pet. p. 21; Br. pp. 75-77) that the District Court failed to make separate findings of fact and conclusions of law. A sufficient answer is that the objection, never having been made before, now comes too late. Cf. *Lucking* v. *Delano*, 122 F. (2d) 21 (App. D.C. 1941); *Drybrough* v. *Ware*, 111 F. (2d) 548 (6th Cir. 1940). Moreover, the opinion presents a clear understanding of the basis of the decision, as the court below noted (D. App. 1133) Cf. *Woodruff* v. *Heiser*, 150 F. (2d) 873 (10th Cir. 1943); *Carter Coal Co.* v. *Litz*, 140 F. (2d) 934 (4th Cir. 1944); *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F. (2d) 4 (7th Cir. 1950).

Stencil Corp. v. *A. B. Dick Co.*, 46 F. (2d) 899 (3rd Cir. 1931); and *Heyer Duplicator Co., Inc.* v. *A. B. Dick Co.*, 59 F. (2d) 787 (7th Cir. 1932). Even more importantly, petitioner fails to note that in September 1948, two years after the entry of the order of remand by this Court in this case in 1946 (329 U. S. 680), and after the disposition of the Cleveland antitrust proceedings by *nolo* pleas and a consent decree, Heyer Duplicator Company filed a petition in the Court of Appeals for the Seventh Circuit praying that court to vacate the judgment it had entered in 1932 in favor of Dick. The petition recited practically all of the allegations which were made in the District Court by the United States in this case. After full briefs and argument on issues which were the same as those in this case, the Court of Appeals dismissed the Heyer petition. *Heyer Duplicator Co., Inc.* v. *A. B. Dick Co.*, unreported (see D. App. 1051) (February 23, 1949).

It cannot be assumed that the District Court, or the three outstanding circuit judges who sat below, or the Court of Appeals for the Seventh Circuit in the *Heyer* case, were not fully cognizant of the necessity for protecting the integrity of the judicial process. The order to investigate that this Court gave to the court below in 1946 (see Statement, *supra*, p. 3) has been fully and completely effectuated. There is no justifiable basis for a retrial of the issues, and no purpose would be served thereby.

CONCLUSIONS

This is, peculiarly and overwhelmingly, a fact case. The facts have been laboriously and extensively examined by the District Court, assisted throughout by all of the resources of the Department of Justice. That the events of importance in the trial ranged over a pe-

riod—1913 to 1927—now almost a quarter-century ago; that the principal actors as well as almost all the participants are deceased; and that petitioner himself may not have exercised full diligence in his own behalf—none of these was felt by the court to minimize the necessity for the fullest possible inquiry. Its conclusion, after a full trial, was in accord with the result which had been reached on essentially the same issues in the Court of Appeals for another circuit, and was likewise in accord with the result reached when similar charges were made and litigated in the early 1930's. Upon full consideration by an exceptionally able Court of Appeals of all proceedings below and of the careful, exhaustive opinion of the District Court, it was held that no further proceedings were warranted. There is not conflict, but accord, among the circuits. The petition should be denied.

Respectfully submitted,

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October, 1952.

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IN THE

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No. 344.

JAMES MARR, doing business as MARR DUPLICATOR COMPANY,

Petitioner,

AGAINST

A. B. DICK COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM 1952

No. 344

JAMES MARR, doing business as MARR DUPLICATOR COMPANY,

Petitioner,

AGAINST

A. B. DICK COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

Reply

The important and far reaching character of the questions presented by petitioner are not briefed by respondent. Respondent relies solely upon technical grounds to justify the dismissal of the appeal.

At R. Br. p. 2, respondent adroitly suggests, that the petition and supporting brief should not contain a complete presentation of the material facts, which reveal the avaricious story of the acts by respondent to secure a favorable adjudication of a patent, by purchasing the silence of Smith and Rowe, and having them kept secret from the courts and the public, the details and circumstances of their dealings with respondent. We believe that this Court should have a clear, definite and complete

disclosure of the facts and law pertaining to the case (Rule 38, 2).

At R. Br. p. 2, respondent has reframed two of these questions, i.e.:

> 1. "Whether the Court below erred in holding that petitioner could not qualify as a party aggrieved and in dismissing the appeal.
>
> 2. "Whether the Court below erred in concluding that no further investigation of the alleged fraud was warranted."

We will not quarrel with the respondent about the substance of these questions, as they are practically a restatement of "Question One" and "Question Two", of the petition (pp. 17-18), except to say, that respondent has also failed to adequately brief these questions.

At R. Br. pp. 2-8, the "Statement" is notable for its omission of material facts. It gives little assistance in resolving the overriding issue propounded by this Court, namely, "Whether respondents prosecution of the instant case may not constitute a fraud upon the Courts" (M. App. Vol. I, pp. 7-9). To this most important question, which goes to the core of justice, no answer is made. Petitioner, urges that interfering with the orderly procedure of justice, by suppressing and concealing evidence, especially in cases where the public interest is involved, undermines the administration of justice.

As to the first of the "reasons for denying the writ" (R. Br. pp. 8-10) the respondent has failed to recognize the importance and seriousness of the point made by petitioner's brief. It is simply this: The granting of the order dismissing the action, with prejudice, upon respondent's motion, was an abuse of judicial discretion and contrary to established principles of law (P. Br. pp. 43-48). Such an order is vulnerable to attack. On this question

the Court below rendered an erroneous decision. Respondent gives no authorities to support its view. The question is therefore worthy of review by this Court.

It is of course absurd to state that petitioner and the Government, as *amicus curiae*, made no objection to the granting of respondent's motion to dismiss. The record belies such a statement, and discloses that the motion to dismiss the judgment was a "bone of contention" from the inception of the proceeding (Pet. pp. 11-12, 14; D. App. Vol. 2, pp. 1163-1168). In fact, the Circuit Court of Appeals, Second Circuit in a *per curiam* opinion held—"* * * and *only in case it* (District Court) *finds that the prosecution did so constitute a fraud; is it to vacate the judgment*, and take such further action as may be proper". —In face of this law of the case the District Court dismissed the action, including petitioner's counterclaim, upon respondent's motion, without a finding of fraud (P. pp. 11-12).

At R. Br. p. 6, respondent says, that pursuant to Article III, Section 11 of the Consent Decree (A. C. Ex. 21), respondent was required to dismiss this suit. This statement is misleading.[1] The decree contains no such provision.[2] It is silent on the matter of dismissal. It

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1. Respondent made a similar misrepresentation to the Special Court of Appeals.

2. Final judgment against A. B. Dick Company, U. S. District Court, Northern District of Ohio, Eastern Division.

Article III, Section 11:

"11. From instituting, maintaining or furthering, or threatening to institute, maintain or further, any claims, suit or proceeding; (a) for the purpose of enforcing any existing injunction prohibiting any person other than Dick from engaging in the manufacture or distribution of stencil duplicating machines, stencils or stencil duplicating supplies, or (b) for the purpose of collecting any royalties, charges, damages or judgment, or for the purpose of enforcing or securing injunctive relief (1) on account of infringement of, or under the designation, "Mimeograph", or (2) on account of infringement of, or under, any patent now or heretofore owned or controlled by Dick relating to stencil duplicating machines, stencils or stencil duplicating supplies".

merely restrains respondent from enforcing any existing injunction, collecting any judgment on account of infringement, of any patent now or heretofore owned or controlled by Dick. Yet respondent argues that it should be permitted to use the Antitrust decree, although it was the wrongdoer there, as a sword to defend and perpetuate its wrong here, by dismissing this action, including petitioner's counterclaim, by its own motion, thereby depriving petitioner of his day in Court,—not only frustrating the fraud inquiry directed by this Court.

As to the first issue: (At R. Br. p. 9), respondent says: "When due to the decree in the *Antitrust* case, Dick was required to dismiss the suit, petitioner became the prevailing party." Here again appears the misleading statement—"Dick was required to dismiss the suit." The entry of the consent decree in the Antitrust suit did not change the situation or make petitioner the prevailing party in this case, nor alter the nature of this proceeding or inquiry, ordered by this Court. We believe that this is a unique and unusual proceeding and is independent of the main cause of action. The inquiry into the question of fraud upon the courts emanated out of this Court, and was founded upon the brief filed by the Solicitor General of the United States (M. App. Vol. I, pp. 224-227). Petitioner was merely the instrumentality through whom the Government proceeded to frame and try the issue.

At R. Br. p. 9, respondent's argument that "had there been a finding of fraud a similar result would have followed—the suit would have been dismissed because of Dick's unclean hands", in no way is analogous to the dismissal of this suit including petitioner's counterclaim, on respondent's motion. It would naturally follow, as a matter of law, that where fraud is involved in obtaining a judgment, the suit would be dismissed and recovery sanc-

tioned by the party defrauded against the wrong-doer. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 246 (1933).

Paraphrasing the language of Mr. Justice Butler, at page 246:

> "Had the corruption of Smith and Rowe been disclosed at the trials * * * the courts undoubtedly would have been warranted in holding it sufficient to require dismissal of the cause of action."

This Court has held in *Universal Oil Company* v. *Root Refining Co.*, 328 U. S. 575, 580 (1946):

> "No doubt if the court finds, after a proper hearing, that a fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceeding could justly be assessed against the guilty parties. The assessment of costs and damages may appropriately be asserted by petition after the suit has been finally disposed of. The right was not waived by failure to claim it expressly in the original suit."—See also, *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 164-168.

If the Court had known of the corruption of Smith and Rowe at the trial of the *Simplicator* case, *Dick* v. *Simplicator Corp.*, 30 F. 2d 715, 34 F. 2d 935 (C. C. A. 2, 1929), the basic "key" case in the original Dick litigation to fraudulently protect its patent, the Court would have undoubtedly dismissed that cause of action (M. App. Vol. II, pp. 294-296; —Petition pp. 25-35). The subsequent disclosure of evidence sufficient to show the corruption of Smith and Rowe through the contingent payments by Dick, and to keep secret the details of the corrupt agreements, and the prior use and knowledge of Smith and Rowe from

the Courts and public, should warrant the exertion of the equitable powers of this Court in setting aside this judgment obtained by fraud, deceit and corrupt means. As said by Mr. Justice Butler, at page 245, *Keystone Driller* case, *supra*, "To aid a party in such a case would make this Court an arbiter of inequity * * *". The fact that respondent was able to hoodwink the Courts by perpetrating its fraud until this present proceeding, is no valid reason to persuade this Court from seeing that justice is done in this case. Time does not wash away one's sins.

At R. Br. p. 10, respondent says, petitioner's contention that the District Judge was sitting as a Special Master for the Circuit Court of Appeals, "was so effectively demolished at the argument below that it no longer appears". We still believe, although this Court by this unique proceeding directed the Circuit Court of Appeals, Second Circuit, to conduct an inquiry into the facts, and for some reason the question was referred to the District Court by the Circuit Court of Appeals, the District Judge was actually acting in the capacity of a Special Master to hear and report back to the Circuit Court of Appeals his findings and conclusions of law. The opinion of the District Judge, which lacks the required findings of fact and conclusions of law, was simply a Master's Report, subject to review by the Court of Appeals, and by this Court.

At R. Br. p. 10, the respondent says, there is no authority and no sound basis for the petitioner's contention that he should be permitted to maintain the appeal. This is a wrong conclusion, unsupported by authority or plausible reasoning. We urge that this is a new, novel and unique question of law, which has not been passed upon by this Court. We have in our brief, at pages 52-54 briefed this question.

At R. Br. p. 10, respondent relies upon the erroneous statement by the lower Court that the petitioner's coun-

terclaim was allowed to lie "completely fallow" for almost twenty years. This statement has no basis in fact or law. Respondent ignores the fact that its fraud, corruption of witnesses and suppression of their evidence, was the proximate cause of the petitioner's inability to prove his answer and counterclaim, and, accordingly an injustice was perpetrated by respondent upon petitioner in the early stages of this action. Petitioner, and his attorneys, never saw or learned of the terms of the contracts between Dick and Smith, and Dick and Rowe; the circumstances of their execution and the scheme to suppress them, until after *1946,* when the existence of these contracts came to public light for the first time (M. App. Vol. I, p. 298), after a Grand Jury investigation by the Antitrust Division; then it became apparent, for the first time, that respondent had corrupted witnesses that might have been called to testify in the *Simplicator,* and in this case.

At R. Br. p. 10, we do not agree with respondent's statement that "this procedural question is plainly not one of general interest or importance". We contend that this question is of far reaching importance and that this cause involves a grave question to the public, the courts and the petitioner, because it involves the purity of the administration of justice, and the rights of petitioner.

Respondent concludes its argument, on this important question, by urging this Court not to review the decisions below on the ground that a similar set of circumstances is not likely to occur, and has not been presented before in any reported case. It is an admission that connotes "there is something rotten in the State of Denmark," that respondent would prefer to keep in the dark. Respondent is seeking this Court to put its judicial stamp of approval on its fraudulent acts. To do so, would, in our humble opinion, be given the green signal to others to commit

fraud with the Court's sanction and approbation. We say, that such argument is fallacious, delusive and erroneous. It is inadvisable to leave the opinions as precedents. The true administration of justice is always the firmest pillar of good government. This is the first principal of our Republic.

As to the second issue: (R. Br. pp. 10-12), respondent says, "petitioner does not challenge particular findings, rather he ignores the fact that findings were made". It is not going too far to repeat that the findings, where they can be elicited from the report or opinion of the District Judge, are false and dangerous in view of the proven facts. We contend, that Judge Medina did not comply with Rule 52(a), Federal Rules of Procedure (P. Br. pp. 75-76). In any event, complete findings must be made. Partial findings are not sufficient to bind a party throughout the appeals. Inadequate or partial findings do not become sanctified because of the *inertia* or peculliar philosophical views of the District Judge. This Court has said, the Rule requires the findings to be full and complete. The report or opinion fails to analyze all the pertinent evidence or adequately cover the issues. It falls far short of the findings of fact and conclusion of law required by Rule 52 (a), Federal Rules of Procedure. *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F. 2d 4, 6 (7th Cir., 1950)).[3]

We believe, that after consideration of the pertinent evidence bearing on the question of fraud upon the Courts, this Court, will reach a "definite and firm conviction that

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3. *Maher* v. *Hendrickson*, 188 F. 2d 700, 701 (7th Cir. 1951); *Platt* v. *United States*, 163 F. 2d 165, 168 (10th Cir. 1947); *Application of Murra*, 166 F. 2d 605, 606 (7th Cir. 1948); *Schwartz* v. *Hygo Musical Products Co.*, 25 F. Supp. 408, 409 (D. C. S. D. N. Y. 1938); *Porto Rican American Tobacco Co.* v. *City Bank Farmers Trust Co.*, 1 F. R. D. 20, 21 (D. C. S. D. N. Y. 1939).

a mistake has been committed". *U. S.* v. *Gypsum Co.*, 333 U. S. 364, 393-396 (1948).[4]

The cases cited by respondent to this question of the failure of the District Court to make separate and full findings of fact and conclusions of law (R. Br. p. 12), are wholly without application.

At R. Br. p. 12, respondent indirectly accuses petitioner's counsel of making "major misstatements and distortions" in the petition and supporting brief, but fails to point out one specific instance. Counsel was most meticulous to see that the statements were supported by record reference. It comes with bad grace for respondent to make unsupported accusations.

At R. Br. pp. 12-13, respondent says, "the same issues have been litigated and relitigated for many years". This statement has no basis in fact. It is deceptive and untrue. For if it were true, it is obvious that this proceeding would never have been remanded by this Court to the Circuit Court of Appeals, Second Circuit. In *Arlac Dry Stencil Corp.* v. *A. B. Dick Company*, 46 F. 2d 899 (3d Cir., 1931) and *Heyer Duplicator Co. Inc.* v. *A. B. Dick Co.*, 59 F. 2d 787 (7th Cir., 1932), the courts and defendants were precluded from seeing the Dick-Smith and Dick-Rowe agreements and obtaining the true facts concerning their execution, due to respondent's suppression of the contracts. It was the respondent's duty to keep faith with the courts by disclosing all material facts, including the contracts, all of which it failed to do. As previously stated, the agreements did not come to light until *1946* (years after the trials of the above actions), when they were unearthed by the Department of Justice. How can it be rightfully said,

4. *Brown* v. *Cowden Livestock Co.*, 187 F. 2d 1017, 1018 (9th Cir. 1951); *Grace Brothers Inc.* v. *The Commissioner of Internal Revenue*, 173 F. 2d 170, 173-174 (1949), 9th Cir.; *Lassiter* v. *Guy F. Atkinson Co.*, 176 F. 2d 984, 993 (1949, 9th Cir.); *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.*, 178 F. 2d 541, 548 (9th Cir., 1950); *Bjornson* v. *Alaska R. R. Co.*, 193 F. 2d 433-434 (9th Cir., 1951).

that these same issues were litigated, upon their merits, prior to *1946*. For a more complete reference to the trials of the above cases, the Court's attention is respectfully called to petitioner's brief, pages 25-35.

At R. Br. p. 13, respondent seems to lay particular stress upon *Heyer Duplicator Co. Inc.* v. *A. B. Dick Co.*, unreported (Feb. 23, 1949). In this case before the Court of Appeals, Seventh Circuit, the Government did not participate, and the Court did not have before it the Government's "Notice of Issue and Facts Thereon To Be Presented By The United States, *Amicus Curiae*" (M. App. Vol. I, pp. 98-120). Petitioner's Petition (M. App. Vol. I, pp. 192-222) or respondent's answers thereto. That petition was not heard upon the merits; it was simply a motion to dismiss Heyer's petition. Dismissal of that petition has no application to the present proceeding, when, we consider that the Court of Appeals, Seventh Circuit, was informed in the course of the argument that the Supreme Court of the United States had remanded to the Circuit Court of Appeals, Second Circuit, the question of fraud upon the courts, and that said question was, at the time, pending and awaiting determination by that Court. To try, at this late date, to psycho-analyze the Court in an effort to determine why it entered an order dismissing the Heyer petition, which order did not provide that the dismissal was with prejudice, would be, at the least, futile. As said, by Judge Medina, "No there isn't any answer" (Record p. 3733).

This is not "particularly and overwhelmingly a fact case". The crucial issues involve mixed questions of fact and law. The petitioner urges that he is correct in believing that the paramount issues in this proceeding come clearly within the decisions of this Court, as enunciated in *Keystone Driller Company* v. *General Excavator Company*, 290 U. S. 240 (1933); *Precision Instrument Manufacturing Company* v. *Automotive Co.*, 324 U. S. 806 (1944); *Hazel-*

Atlas Glass Company v. *Hartford Empire Company*, 322 U. S. 238 (1944); *Kingsland* v. *Dorsey*, 338 U. S. 318 (1949), and cases cited in the original brief (pp. 61-70), which respondent has deemed fit to ignore; these cases emphatically announce that this Court will not tolerate tampering with the administration of justice.

The petitioner stands squarely upon the position that the elements of fraud here disclosed "demands the exercise of the historic power of equity". The District Judge and respondent take a directly opposite view. The Special Court of Appeals failed to effectuate the mandate of this Court dated December 20, 1946, and the order of this Court dated January 29, 1952, respectively, and expressed no view upon the merits, but dismissed the appeal upon technical grounds. There is no middle ground or compromise. Either the petitioner is right or the District Judge and respondent are right. The questions are of such controlling importance that it would be an injustice for this Court to fail to decide the questions directly, upon the peculiar circumstances and facts here presented. We respectfully ask only a full consideration by this Court, and a result that will preserve the integrity of the judicial process, and protect the rights of the public and petitioner. The petition should be granted.

Respectfully submitted,

EDWARD D. BOLTON,
Attorney for Petitioner.

EDWARD D. BOLTON,
M. NEIL ANDREWS,
Of Counsel.

November 1952.

PETITION

FOR

REHEARING

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FILED
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IN THE

Supreme Court of the United States

October Term, 1952.

No. 344.

JAMES MARR, doing business as MARR DUPLICATOR COMPANY,

Petitioner,

AGAINST

A. B. DICK COMPANY,

Respondent.

PETITION FOR REHEARING.

EDWARD D. BOLTON,
Counsel for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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OCTOBER TERM, 1952.

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—o—

JAMES MARR, doing business as MARR DUPLICATOR COMPANY,
Petitioner,

AGAINST

A. B. DICK COMPANY,
Respondent.

—o—

PETITION FOR REHEARING.

Now comes James Marr, doing business as Marr Duplicator Company, the petitioner in the above entitled cause, and respectfully prays that a rehearing be granted and certain injustices be remedied.

Grounds for Rehearing.

On November 10, 1952, this Honorable Court denied petitioner's petition for a writ of certiorari. Justice Clark did not participate.

The rehearing is sought on the grounds, *First,* the specially constituted Court of Appeals was not fully conscious of its responsibilities when it failed to review the question, whether respondent's "prosecution of the instant case may not constitute a fraud upon the Courts", and dismissed the appeal as moot, on the grounds, that the District Court

had granted plaintiff's (respondent's) motion to dismiss the entire case and entered an order of dismissal with prejudice, and that a party's role as protector of the public or Court's interests was not enough to prevent the case from being moot, and *Second,* dismissed the appeal at the cost of appellant (petitioner).

The failure of the Court of Appeals, and the refusal of this Court to grant a review leaves the important question of fraud upon the Courts, unanswered, in so far as the Appellate Courts are concerned. Such action leaves the answer to the question, originally propounded by this Court, in a rather anomalous muddle, and resting in the region of limbo.

Alarming, we think, is the word to describe the uncontroverted facts and circumstances unfolded by the Government at the hearings. It is alarming when a litigant seeking the aid of a court of equity to establish a patent monopoly, is permitted to enter into agreements with certain parties wherein are to be found expressed conditions that they will not receive certain payments if they disclosed to others, or the courts, any information they possessed concerning the prior art. It is alarming when it is admitted by these parties that the contingent payments, provided in the agreements, were conditioned on the Court's accepting their testimony that they had not made a prior public use or invention prior to respondent's patent, or had any knowledge thereof, and that if the patent was held invalid because of their prior knowledge or use, they would not receive the contingent payments. They, respectively, having a $10,000.00 and a $50,000.00 stake in the sustaining by the Court of respondent's patent.

It is alarming to know that the parties who were silenced and made adverse witnesses for others, gave untruthful answers to questions propounded to them concerning the agreements and had concealed the elements of the agreements and declined to turn the same over to the Fed-

eral Bureau of Investigation, and had refused to give or reveal any information concerning the terms thereof, on the advice of respondent's counsel.

It is alarming to hear that respondent failed to keep faith with the courts by mentioning or calling to the attention of the courts, the existence of the secret agreements, and when faced with their existence, made untruthful and misleading statements that since the signing of the agreements, respondent had had no contact or control over the parties whatsoever, and that the parties had no further interest in the matter, when at the time, they were respectively subservient to the respondent, due to the corrupt arrangement to keep silent.

It is alarming to know that the efforts to get at the whole truth was blocked by the willful misrepresentations, false statements and questionable tactics resorted to by respondent.

There is more—considerably more—as the record will reveal, showing a direct connection between the parties to the agreements and others, to commit a fraud upon the courts with the intent of obstructing the orderly procedure of justice.

We urge that a study of the record presents a sordid story of intrigue. One that makes a mockery of justice and is of deep concern to those who still have faith in the judicial process. In this Honorable Court is vested the authority to correct and condemn the acts of respondent and its cohorts and prevent the repetition thereof. It should not be permitted to make justice a "dead letter".

And it is alarming when the lower court, contrary to established law, held that the action of the District Court in dismissing the case, after judgment, upon plaintiff's (respondent's) motion, made the appeal moot. This is especially more apparent, when it is considered, that the rights of the petitioner and the public interest has been materially affected.

And finally it is alarming that the appeal was dismissed at the cost of appellant (petitioner).

We appeal to the conscience of this Honorable Court, and respectfully urge that the awarding of costs to respondent be set aside. It is, I feel not only a grave injustice but one that will have a dilatory effect upon others who feel it is their duty to bring to the attention of the courts a planned and carefully executed scheme to subvert justice. Upholding the integrity of the judicial process is paramount. Exactly what will be the result, if this injustice is not corrected? The petitioner will be severely penalized for taking a meritorious appeal in a unique case involving novel questions that affects the judicial and public interest, on the advice and urgent demands of the Department of Justice. Counsel desires to go on record, that the appeal was taken at the instance and request of the Attorney General's Office, and upon the assurance that the Government would, with the approval of the court, continue to act as *amici*. Such approval was granted. Subsequently, certain representatives of the Attorney General's Office, for some mysterious reason, failed to keep faith with petitioner and the court. Why, in all fairness and justice, in a unique proceeding, such as this, should petitioner be charged with costs? It is inequitable.

CONCLUSION.

For the above reasons, it is respectfully urged that a rehearing be granted in order that complete justice may be effected.

Respectfully submitted,

EDWARD D. BOLTON,
Counsel for Petitioner.

The undersigned counsel for petitioner certifies that the within petition for rehearing is filed in good faith, not for delay, and is, as counsel believes, restricted to the grounds specified by Rule 33, as amended, Supreme Court Rules.

EDWARD D. BOLTON,
Counsel for Petitioner.

November, 1952.